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## CITATIONS


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664408—45

# In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 287

V. MOORE, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The majority and dissenting opinions in the circuit court of appeals (R. 103–109) have not yet been reported. The memorandum opinion of the district court appears at pages 7–10 of the record.

### JURISDICTION

The judgment of the circuit court of appeals was entered July 2, 1945 (R. 109). The petition for a writ of certiorari was filed August 1, 1945. The jurisdiction of this Court is invoked under

Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.[1]

**QUESTIONS PRESENTED**

1. Whether a criminal contempt proceeding for violation of an injunction must be instituted by indictment.

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[1] Petitioner's appeal to the circuit court of appeals was taken by notice of appeal (R. 11–12), rather than by application for allowance of an appeal as required by Section 8 (c) of the Judiciary Act of February 13, 1925 (28 U. S. C. 230). The circuit court of appeals, following the decision in *United States ex rel. Brown* v. *Lederer*, 139 F. 2d 861 (C. C. A. 7), held that, by virtue of the Act of November 21, 1941, c. 492, 55 Stat. 779, 18 U. S. C. 689, Supp. IV, extending the authority of this Court under 18 U. S. C. 687 and 688 to promulgate rules of procedure in criminal cases to cover proceedings to punish for criminal contempt, the Criminal Appeals Rules automatically became applicable to such proceedings. It is our position that the Criminal Appeals Rules do not apply in the absence of an order by this Court extending them to appeals in contempt proceedings. This Court apparently accepted our view when it granted certiorari in the case of *In the Matter of Michael*, No. 964, October Term, 1944, in which the petition would have been out of time had the Criminal Appeals Rules been applicable. However, it should be noted that during the three months' appeal period, the district judge approved an appeal bond (R. 13) and entered orders in respect of the record on appeal and with reference to the time within which to settle the bill of exceptions and file assignment of errors. For the purpose of conferring jurisdiction upon the circuit court of appeals we do not dispute that there was a sufficient compliance with the technical requirements of Section 8 (c). Also, in *Nye* v. *United States*, 313 U. S. 33, 44, this Court, by an equally divided vote, affirmed the action of the circuit court of appeals in taking jurisdiction of an appeal in a contempt proceeding on the basis of a notice of appeal.

2. Whether the district judge abused his discretion in fixing the fine against petitioner.

## STATUTE INVOLVED

Section 268 of the Judicial Code (28 U. S. C. 385) provides in pertinent part as follows:

> The courts of the United States shall have power * * * to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except * * * the disobedience * * * by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts.

## STATEMENT

On September 9, 1944, in the United States District Court for the Western District of Oklahoma, petitioner was temporarily enjoined from selling used automobiles at prices in excess of the ceiling prices and from offering cars for sale without having proper price tags attached thereto, as required by the regulations of the Office of Price Administration (R. 2–3). On September 29, 1944, the Government instituted proceedings to punish petitioner for criminal contempt and alleged that on September 21, 1944, petitioner had offered two cars for sale without proper price tags attached, and had sold such cars at prices in excess of the ceiling prices (R. 1–5). An order to show cause was issued (R. 5), and petitioner

filed a response in which he denied that he had violated the preliminary injunction (R. 6). After hearing evidence (R. 18–97) the district judge found petitioner guilty and referred the cause to a probation officer for investigation and report before fixing sentence (R. 7). Thereafter, the judge filed a memorandum opinion in which he set forth his findings that petitioner had wilfully and intentionally violated the preliminary injunction in that, in the sale of two cars to members of the merchant marine on furlough, he had failed to have the cars properly tagged and had received $300 and $200, respectively, more than the ceiling prices on such cars (R. 7–10). Petitioner was fined $5,000 and was ordered committed until the fine is paid, with the proviso that if he should furnish receipts showing repayment of the money illegally exacted from the buyers, the fine would be reduced by such amount (R. 10–11).

On appeal, in which petitioner attacked the fine as excessive (R. 12), the judgment was affirmed (R. 109), one judge dissenting (R. 108–109).

**ARGUMENT**

1. Petitioner's contention (Pet. 6, 7, 10–11, 12–15) that criminal contempt proceedings must be prosecuted by indictment is frivolous. It has long been established that although proceedings to punish for criminal contempt have a number of the characteristics of criminal proceedings, they

are *sui generis* and are not criminal prosecutions within the purview of the Fifth and Sixth Amendments in respect of the mode of accusation and method of trial. *Myers* v. *United States,* 264 U. S. 95, 104–105. See also *Nye* v. *United States,* 313 U. S. 33, 42–44; *Ex parte Grossman,* 267 U. S. 87, 117; *Ex parte Hudgings,* 249 U. S. 378, 383; *Gompers* v. *United States,* 233 U. S. 604, 610; *Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447, 489; *Eilenbecker* v. *Plymouth County,* 134 U. S. 31, 39; *Savin, Petitioner,* 131 U. S. 267, 275.

2. Petitioner's attack upon his sentence as excessive (Pet. 7–8, 10–12, 15–17) presents no question for further review by this Court. Such a sentence is reviewable only for gross abuse of discretion. *Huffman* v. *United States,* 148 F. 2d 943, 944 (C. C. A. 10). See also *United States ex rel Brown* v. *Lederer,* 140 F. 2d 136 (C. C. A. 7), certiorari denied, 322 U. S. 734; *United States* v. *Bollenbach,* 125 F. 2d 458, 460 (C. C. A. 2); *Creekmore* v. *United States,* 237 Fed. 743 (C. C. A. 8), certiorari denied, 242 U. S. 646; *Oates* v. *United States,* 233 Fed. 201, 208 (C. C. A. 4), certiorari denied, 242 U. S. 633. The memorandum opinion of the trial judge makes it clear that, among the factors which he considered in fixing the amount of the fine, were the circumstances that the acts with which petitioner was charged constituted four separate violations of the Emergency Price

Control Act, each of which was subject to a maximum punishment of one year's imprisonment and a $5,000 fine (50 U. S. C. App., Supp. IV, 925 (b)); that other violations had been proved in support of the motion for preliminary injunction; and that the acts on which the contempt proceedings were based were committed only twelve days after the preliminary injunction had been issued (see R. 9). In addition, the cause was referred to a probation officer for investigation and report before sentence was imposed (R. 7). It is thus evident that the sentence was not arbitrarily fixed, but represented an exercise of considered judgment on the part of the district judge.

## CONCLUSION

The decision below is correct. It presents no conflict of decisions or question of general importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1945.

U. S. GOVERNMENT PRINTING OFFICE: 1945